No. 97-404 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CYNTHIA J. FISHER,

Petitioner,

—v.—

VASSAR COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF

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REPLY TO RESPONDENT'S BRIEF

Respondent's Counterstatement of the Question reviewed, would relieve this Court of any further need to consider the case because, of course, no one denies that an appellate court has the power to review for clear error even a finding of liablity under Title VII and/or ADEA that is supported by facts giving rise to a prima facie case and a sustained finding of pretext. Instead of this non-issue, the vital questions raised squarely by this case are those stated in Petitioner's request for the writ of certiorari and restated briefly below.

Respondent concedes that a split in the circuits exists concerning the application of the *St. Mary's* standard to a case where a suggestion of the employer's mendacity undergirds the sustained finding of pretext, but seeks to obscure that clear legal issue by arguing that it is not presented here because "one cannot identify any facts in this record to support any finding of 'mendacity.'" (Resp. Br.. p.3) On the contrary, as shown below, the district court made ample findings of the employer's mendacity which were left undisturbed by the reviewing panel. This case is an appropriate vehicle for this Court to provide much-needed instruction to the lower courts concerning the legal issues presented here.

Preliminary Statement

Petitioner has urged three interrelated issues, all of which are significant beyond the facts of this case.

The first question asks this Court to resolve a conflict among the circuits concerning how much and what kind of evidence, in addition to the showing of a prima facie case

and a finding of pretext, is required to sustain a finding of discrimination . On this point Respondent seeks to portray Petitioner's position as an extreme one. Respondent argues:

> "The stated rationale of the passages that petitioner cites...is that (1) a natural and logical inference of unlawful discriminaton can *always* be drawn from an employer's explanation that is proven to be mendacious, so that (2) a district court's sustainable finding of 'pretext' based on such mendacity must *always* render unreviewable its ultimate finding of unlawful discrimination." (Resp. Br. p. 2)

Petitioner made no such extreme argument, nor did the dissenters in the in banc court do so. Rather, Petitioner and the amici have urged, as this Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity), may, together with the elements of the prima facie case, suffice to show intentional discrimination." 509 U.S. at 511.

Second, this case raises the question whether an appellate court, on the principles underlying Federal Rule of Civil Procedure 52 (a) may reverse a trial court's finding without clear supportable reasoning, based on a detailed review of the facts or marshalling the evidence on which to base such reversal.

Third, this case presents a telling instance of the way in which a discriminatory sex-stereotype may injure women protected by federal discrimination law. That issue is seminal to this case and its disregard has fueled the reasoning of the court below on the other two issues. Petitioner asserted that

the discrimination imposed on her concerned her status as a married woman in academia in the hard sciences. The court below found that Vassar considered it a negative significant factor that the plaintiff, a married woman, had taken off a period of at least eight years away from her career in science to be with her family before returning to academia where she distinguished herself as teacher and research scientist. The court below specifically conceded that the "evidence supports an inference that Fisher's eight year absence from academia hurt her chance for tenure." (57a) The court nonetheless declared that there was nothing improper for Vassar to rely on that "hiatus" in Fisher's career as a negative disqualifying factor, that it was not a discriminatory sex-stereotype, despite the clearly reasoned opinion of the district court holding it to be so.

The Counterstatement of the Case

Respondent claims that the district court's judgment was reversed "because the discrimination finding could not be sustained by *any* (sic) evidence of record, or by any inferences tenably arising from such evidence..."(Resp. Br. p.2) As Petitioner pointed out, Chief Judge Newman dissenting in the court below, stated that the panel decision "did not even purport to deem deficient the evidence underlying either the plaintiff's prima facie case of discrimination against married women or the finding of pretext. Not one of the District Court's 111 subsidiary findings of fact was ruled unsupported by the evidence." (289a, 290a) Instead, the court below reversed the liability judgment against Vassar "because our conviction that a mistake has been committed is definite and firm." (7a).

Petitioner does not argue that a decision of a district court cannot be reviewed under the "clearly erroneous"

standard of FRCP 52(a). Petitioner and the amici do contend, however, that the reviewing court is bound by other rules and standards and may not reverse a district court which has appropriately ruled on the evidence before it and the inferences to be drawn from that evidence simply because it would have decided the case another way. See *Anderson v. City of Bessemer City* ,470 U.S. 564. 573-574 (1985).

Since Respondent has placed so much weight on the supposed absence of any factual support in the record for a suspicion of mendacity, Petitioner welcomes the opportunity to cite findings of fact by the district court pertinent to Vassar's mendacity and to its ruling that Vassar intended, by its mendacity, to hide illegal discrimination involving a sex-based sterotype against married women in the hard sciences. In urging this thesis and its non-question upon this Court, Respondent arrogates the role of fact-finder and undertakes to review the facts of this case as the court below failed in its obligation to do.

1. As to her publications, the court found "the Department's conclusions ...and other comments...about her published work were disingenuous, pretextual and clearly made in bad faith." [1]

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[1] Judge Calabrisi, dissenting, has an extensive footnote on the district court's ruling on the relative importance of scientific journals which underlines his own admitted ignorance of the significance of the Science Citation Index (SCI). (354a,note 13) He said"What are first class reviews is not for the district court to determine." Evidence adduced at the trial concerning SCI established the importance of SCI (80a,81a)and Petitioner's track record in the highest rated journals which compared her favorably to other tenured faculty. As further authority , "No Nobel Prize This Year? Try Footnote Counting, " *New York Times*, Oct. 7, 1997, p.F4, See also Steven

2. The committee incorrectly stated that one of her grants was secured only after five unsuccessful attempts." (91a)

3. "...The Department's inference that co-principal investigator (a title petitioner held on an awarded grant of over $200,000) is less important is 'not at all' true." (93a)

4. " The Court finds the Committee's quotation of language from the Poodry letter and the attached reviews in its recommendation to be purposeful dishonesty." (93a)[2]

5. Re. Criticism of Petitioner's presentation at a research colloquium: "This was a spurious criticism since her colloquium involved a review of the techniques she invoked to secure her grant proposal." (94a)

6. Re Petitioner's sabbatical leave activities: "This statement stands out starkly as another demonstration of

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Weinberg *Dreams of a Final Theory* p. 121 where he placed his ratings in SCI above his Nobel prize.

2 Respondent, aware that the finding of purposeful dishonesty" is synonymous with "mendacity" tries to explain away the district court's finding. Respondent offers a skewed explanation which ignored the significance of the deceit. (Resp. Br. pp.20-23) Because the successful letters showing the award of the grant were removed from petitioner's tenure file at the Chairman's suggestion, all that was left in the file for review was the record of the granting agency's characterization of petitioner's unsuccessful grant applications, assessed as "fair to good," not "very good to excellent." The Department in its recommendation letter, relying on these rejected grant applications, characterized her successful grant applications as graded only "fair to good" to show falsely that petitioner was not highly regarded by the granting agency. (See Exhs. 8, 62A, Tr. 286-290

the Department's bad faith since Dr. Fisher's scholarship was superior or at least equal to the scholarship of the three men and single woman who preceded her in achieving tenure as well as the man who subsequently achieved tenure." (99a)

7. "Based on the foregoing testimony and evidence, the court finds that these conclusions concerning Dr. Fisher's scholarship were made in bad faith, were pretextual, and represented the application of patently discriminatory standards." (103a)

8. "[D]espite Dr. Fisher's impressive record which was superior or equal to the scholarship of the three men and single woman) who received tenure between 1979 and 1985 and the one man who received tenure in 1987, conclusion,that her overall scholarship accomplishments were 'mixed'..They credited her with 'energy,' but questioned her 'independence' as a scholar and the 'depth of the mastery of the field in which she was working.'...Based on the foregoing testimony and evidence, the court finds that these conclusions concerning Dr. Fisher were made in bad faith, were pretextual and represented the application of patently discriminatory standards."(109)

9. .. Re teaching: The Committee distorted the numbers by counting only fives for Dr. Fisher while counting fours and fives for the other candidates to determine student evaluation rankings. Additionally, the Committee emphasized a few critical comments about Dr. Fisher's teaching instead of noting the genrally affirmative comments that were made by the student committees." (111a)

10. Re the development of a 300 level course, "This was false both as to Dr. Fisher and as a standard applied to other tenure candidates. (120a) "It is additionally significant that early evaluation by the Department of Dr. Fisher's service to the College and the Department were glowing. (Exh. 5G,5N) The only explanation for the change in attitude towards Dr. Fisher that the court can find is the discrimination manifested in its decisions concerning her culminating in its decision not to promote her. "(121a)

11."The Biology Department, in its negative tenure recommendation, minimized the importance of Dr. Fisher's many grant successes...The departmental letter even criticised Dr. Fisher's funded grant applications implying that the expert peer reviewers for these highly competitive national awards were somehow remiss in failing to spot the defects in her work which the Vassar Biology Department was able to discover...Research grants are awarded by the NIH and NSF under extremely competitive circumstances and only after intensive review by a panel of expert peers in the scientific discipline of the person submitting the grant..These criticisms were in sharp contrast to the recommendations made concerning the three male candidates who had been granted tenure while Dr. Fisher was on the faculty." (92a)

The Unrecognized but Determinative Sex Sterotype Against Married Women in the Hard Sciences

Petitioner was sex-stereotyped because she had taken out at least eight years of her career to be with her husband and children before Vassar hired her and which hiatus had ended eleven years before her tenure review.

The sex stereotype which evaded the understanding of the court below and to which Respondent proves equally

blind has plain statement in the record in findings by the district court. Said that court:

> "...[C]omments on the pre-Vassar personal life and life choices were not made in any letters of evaluation of other faculty. The Biology Department...focused on this 'hiatus' aspect of Dr. Fisher's life choices regarding familty priorities when the Committee made its in-person presentation to the FASC Committee on May 3, 1985, regarding its reasons for rejecting Dr. Fisher's candidacy. At that meeting the Department represented to the FASC Committee that Dr. Fisher was 'out of date—out of the field for 10 years.'...The reference to being 'out-of- date implied that Dr. Fisher's scholarship was obsolete as a direct result of the period she was at home with her husband and children." (127a)

On that issue, the original panel decision, left untouched by the in banc court, makes clear that, at least in the Second Circuit what is called the "mommy track is the law. Married women who take time out of their careers for family may be permanently stigmatized in the employment scene. An employer may use that 'hiatus' for for unfavorable later review even if the time out was before the employment in question, and even if the employee has out-performed her cohorts on the job. If the employer says this is the reason for an unfavorable review, no court may hold the reason sex-based or stereotypical. The panel dccision, upheld, but not reviewed by the in banc court stated:

> "In making tenure decisions, it is perfectly reasonable to consider as a factor the candidate's prolonged absence from academia in making hiring and

promotion decisions. The law does not prevent employers from considering such things.

" A policy may discriminate between those employees who take off long periods of time in order to raise children and those who either do not have children or are able to raise them without an appreciable career interruption. That is not inherently sex specific and does not give rise to a claim under Title VII" (58a, 59a)

The district court finding of sex stereotyping, rejected completely by the decision in this case, is inconsistent with holdings of this Court as set forth in the Petition and should not be the law of the land. (Pet. Br. pp. 17-23). The failure of the court below to recognize this stereotyping and the prejudice against married women in science, historically and at Vassar for its entire history up until the Fisher case, demonstrates how accepted is the stereotype. [3]

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3 Much is made by Respondent of the reference by the Court below to the statistics showing that no married woman in the hard sciences had ever been tenured at Vassar in the whole history of Vassar. The Dean of the College admitted this fact (132a) (except for psychology—only one (Resp. Br. p.8) It is further inexplicable how Respondent can urge in support of its position the fact that other married women in the hard sciences attained tenure *after* Petitioner had brought this law suit. Respondent, although caviling with Petitioner's statistical model, could nonetheless point to no such married woman on Vassar's faculty in the hard sciences prior to Petitioner's complaint.

Further, as to whether psypchology is a hard science (Resp. Br. p. 8,9,) Petitioner submitted evidence, accepted by the district court that in 1985, psychology was categorized by the National Academy of Sciences as a "social science." (Exh. 84a, 126a)

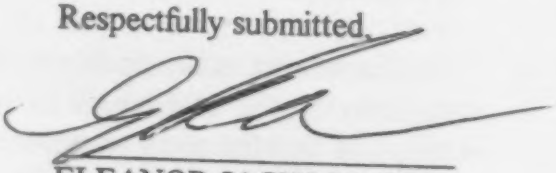
In summary, it is clear that even in Respondent's denials, and certainly in the careful and lengthy arguments of the five dissenting judges of the Second Circuit, that this case raises issues of significant importance to federal jurisprudence in discrimination law.

CONCLUSION

For the reasons stated in the Petition, as augmented here, this Court should grant the Petition for Certiorari.

October 20, 1997

Respectfully submitted,



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